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RECLAIMING REFUGEE RIGHTS AS HUMAN RIGHTS

Roni Amit*

As the Universal Declaration of Human Rights (“UDHR”)¹ turns 70, many of the rights laid out in this once aspirational document have become well-established in treaty and customary international law. One area where aspiration has not become reality, however, is in the realm of asylum. Despite the UDHR’s proclamation that everyone has the right both to seek and to enjoy asylum (Article 14), refugee rights have not become human rights. In fact, a mere three years after the UDHR, the Refugee Convention² emerged with no corresponding right to asylum. The result has been a lack of clarity over how refugee rights fit within the human rights framework. As humanitarian crises around the world give rise to unprecedented levels of migration, this gap provides a space for states to evade their protection obligations and to place refugees outside of the rights framework.

Refugee rights have always been somewhat at odds with the fundamental principles underlying the international human rights system. Although conceptually based on the idea that individuals hold certain inalienable rights, the modern human rights system is premised on the idea of individuals making rights claims against the state. Yet, the refugee’s defining feature is the absence of a state against which to make claims, what Hannah Arendt has termed “the right to have rights.”³ Having fled from the state against which they hold rights claims, refugees exist in a state of exception, standing outside of the law and relying on the prospect that a state’s humanitarian inclinations will outweigh security and economic interests.

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¹ G.A. Res 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

² Convention relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137.

³ HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 294 (1951).

For individuals in this situation, the Refugee Convention provides no right to asylum that they can assert. In fact, unlike other human rights treaties, it does not adopt the language of individual rights at all. Article 2, the only Convention article in which the refugee is the subject, focuses on the obligation of the refugee to their host country. Rendering states as subjects, the remaining provisions employ the language of state obligations. This language provides no scope for the individual refugee to make claims against the state.

The language around asylum and refugee protection is rarely one of fundamental human rights. Instead, refugees are discussed almost exclusively through the lens of the Refugee Convention and its concomitant state obligations. The human dignity of the individual refugee is subsumed by the language of international relations as words like humanitarian crisis, burden sharing, sovereignty, security, and economics dominate the refugee debate. The individual stands apart from this debate. A moving image such as a child washed ashore may briefly shift attention to humanitarian considerations, but the larger debate remains unchanged. Outside of the refugee framework, the practice of human rights protection faces similar challenges rooted in state interests and the realities of the international system, but the conceptual framework remains one of individual rights. By contrast, refugee law and its focus on the state render the refugee instrumental to other interests not just practically, but also conceptually.

The dislodgment of individual rights by state interests stands only to be heightened amidst record numbers of forced migrants. With over 70.8 million displaced people,⁴ the assertion of individual rights gives way to questions of sovereignty and territoriality. In this context, the Refugee Convention becomes an instrument not of refugee protection but of migration control. The Convention's focus on state obligations facilitates this process. States do not deny the humanitarian imperative of the Convention, but they increasingly narrow the categories of individuals who are entitled to protection under this imperative. The state-centric language of the Convention enables states to engage in interpretive sleights of hand to narrow

⁴ *Figures at a Glance*, UNHCR, <https://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Sept. 8, 2019).

the Convention's reach. The result is that the bulk of migrants today increasingly fall outside of a state's interpretation of who is a refugee. To further minimize the humanitarian aspects of migration, states label those seeking protection as economic migrants or security risks.

While states facing high migrant numbers have long engaged in this practice, the current migration crisis has facilitated its adoption on a global scale. At the height of Zimbabwe's humanitarian crisis in 2008 and 2009, for example, almost 300,000 Zimbabweans sought asylum in South Africa,⁵ making it the top global recipient of asylum seekers.⁶ Ignoring the links between political dynamics and the humanitarian crisis, South Africa labelled all Zimbabweans as economic migrants. Similarly, today individuals fleeing extreme gang-based violence, recruitment, and sexual slavery in the Northern Triangle countries of Latin America are treated as economic opportunists, criminals, and security risks, while gang-based persecution is excluded from the refugee definition in the US. In Europe, a refugee who leaves Greece or Turkey in search of a more fully realized life accordant with human dignity acquires the status of an economic migrant—a status imposed in response to their pursuit of the fundamental right to dignity. Even those fleeing Syria's brutal civil war do not fall within the scope of the Convention's refugee definition unless they are specifically targeted based on one of the protected grounds. Even then, they must overcome the security risk label, an obstacle that is virtually insurmountable in the US as a result of the Muslim ban.

The changing nature of rights violations has sparked calls to reform the refugee definition so that it aligns more closely with the types of threats currently giving rise to flight. While well-meaning, this proposal comes with its own sets of problems. First, any definition that continues to privilege certain types of harms over others without recognizing the fundamental rights of the individual will continue to have winners and losers. In carving out a narrow humanitarian exception, the stage is set for states to continue to

⁵ Roni Amit & Norma Kriger, *Making Migrants 'Il-Legible': The Policies and Practices of Documentation in Post-Apartheid South Africa*, 40 KRONOS 269, 272 (2014).

⁶ UNHCR, *DISPLACEMENT: THE NEW 21ST CENTURY CHALLENGE* 25 (2013), <https://fas.org/irp/agency/dhs/fema/displace.pdf>.

define individuals out of this exception. Moreover, states are unlikely to adopt an overly-broad definition that expands their obligation to accept migrants.

But realpolitik is not the only reason that this solution holds little promise. In the developing world, where most refugees are located, legal status may have little effect on an individual's daily existence.⁷ Refugees and asylum seekers are largely unable to access rights guaranteed to them under both international and domestic law. The state-centered focus of refugee protection encourages states to meet their obligations by carving out exceptional spaces for refugees through camps, offshore facilities, and agreements with other countries to restrict movement. Individuals may enjoy the bare minimum of refugee protection in these spaces—protection against *refoulement*—but they have no access to fundamental human rights. Instead, they live a liminal existence, unable to realize many elements of human dignity—work, education, family life, non-discrimination, political expression—as these exceptional spaces operate separately from the rest of the territory and its legal framework.

What does this mean for the future of refugee protection? The refugee framework reflects historical realities and power dynamics. Accordingly, refugee protection has always been political.⁸ Barring any seismic shifts in the state-based international system, this will continue to be the reality. But conceptual shifts are possible. By understanding migration through a human rights lens, we can move away from dichotomies between good and bad, deserving and criminal, or political and economic migrants. Individuals facing human rights violations of any kind have a right to escape these violations, regardless of the nature of the threat and whether it fits into the narrowly defined scope of persecution laid out in the Refugee Convention.

The right to escape human rights violations is embedded within a broader freedom of movement rooted in human dignity. Human dignity is the core concept of human rights. In considering

⁷ Loren B. Landau & Roni Amit, *Wither Policy? Southern African Perspectives on Understanding Law, 'Refugee' Policy and Protection*, 27 J. REFUGEE STUD. 534, 535 (2014).

⁸ See Guy S. Goodwin-Gill, *The Politics of Refugee Protection*, 27 REFUGEE SURV. Q. 8 (2008).

rights violations, courts have found certain non-enumerated rights such as education and work to be integral to human dignity⁹ and have outlawed contentious security practices deemed to violate human dignity.¹⁰ Similarly, the right to movement is an essential component of human dignity, a linkage that Thomas Jefferson recognized in characterizing expatriation as an inherent right, essential to the pursuit of happiness.¹¹

Finally, refugee protection is as much local as it is global. Rather than speaking exclusively in the lofty language of human rights, we need to appeal to local constituencies and their concerns. While states reference sovereignty and national security, individuals are often focused on more provincial concerns around housing, labor, health care, and education. It is precisely when these interests are ignored that populist messages about the dangers of migrants resonate. By focusing on sectors and policies at the local level, we can foster support for migrant rights in a way that takes these concerns into account.

The concept of refugee rights as human rights is found neither in refugee law nor in state practices around refugee protection. As a result, the refugee has become largely instrumental to broader state concerns. Displaced as a subject of the law, the refugee cannot access international or domestic legal protections, as states increasingly place refugees in extra-legal spaces. By reconceptualizing refugees and migrants through a human rights lens, refugees can re-enter these spaces and reassert their rights. At the same time, moving beyond a purely humanitarian framework can serve to challenge populist anti-migrant rhetoric.

⁹ *Minister of Home Affairs v. Watchenuka* 2004 (4) SA 326 (SCA) at paras. 32, 36 (S. Afr.) (finding that a blanket ban on employment and study for asylum seekers violated the right to human dignity).

¹⁰ HCJ 5100/94 Public Committee Against Torture v. Israel 53(4) PD 817 (1999) (finding that the security service's use of moderate physical pressure against suspected terrorists in ticking time bomb situations violated human dignity).

¹¹ Letter from Thomas Jefferson, to John Mannors (June 12, 1817), <https://founders.archives.gov/documents/Jefferson/03-11-02-0360>.